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# Patent Pleading Standards After *Iqbal*: Applying Infringement Contentions as a Guide

*Richard A. Kamprath*<sup>1</sup>

*Abstract: This article examines how the new standard for pleading claims related to patent infringement should be interpreted in light of the Supreme Court's decisions in *Twombly* and *Iqbal*. The facial plausibility of a pleading requires more than bare allegations and must be supported with enough facts for the court to infer wrongdoing by the accused infringer. This article focuses on the application of this new pleading requirement to patent infringement cases.*

*Federal Rule of Civil Procedure 8 is the starting point in understanding pleading standards in the federal courts. Additionally, the article discusses the relationship between Rule 8 and Rule 11, specifically in the context of patent pleading. Form 18, which outlines a basic infringement claim, may be used for literal infringement according to Federal Rule 84. Judge Dyk's dissent in the Federal Circuit's *McZeal* decision, however, raises many questions about the sufficiency of Form 18 that are pertinent following *Iqbal*. This article also addresses what is required for pleading other patent claims, such as the doctrine of equivalents and contributory infringement.*

*Some argue that infringement contentions should now be used as a model for pleading patent-related claims. Each element of a cause of action should be presented with enough factual matter to allow the court to infer wrongdoing by the accused infringer. While a greater burden is placed on the plaintiff to develop and reveal these facts early in the case, this requirement also allows the plaintiff to influence the court through favorable claim interpretations, claim charts, and claim contentions before the accused infringer has a chance to develop contrary facts.*

*This article presents a framework for pleading patent-related claims based on case law and local patent rules. Because the Supreme Court's *Iqbal* decision and the Federal Circuit's *McZeal* decision seem to raise more questions than they answer, the article proposes a methodical approach to patent pleading that harmonizes the courts' opinions. The pleading requirements are interpreted in order to create a roadmap that can be used by both academics and practitioners alike.*

## I. INTRODUCTION

Since the Supreme Court's decision in *Iqbal*, the standard for sufficiently pleading patent related causes of action has become relatively un-

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clear.<sup>2</sup> Federal Rule of Civil Procedure 8(a) governs the pleading requirements of a complaint, including those related to patent infringement, and it requires only a “short and plain statement” with a few requirements.<sup>3</sup> “Rule 8(a) does not require that a plaintiff plead facts sufficient to show that it will ultimately succeed on the merits.”<sup>4</sup> What suffices to show entitlement to relief has evolved considerably in the last fifty years—especially since the *Twombly* decision. The changes in the common law have left ambiguity and uncertainty in the pleading requirements of a complaint.<sup>5</sup> This article attempts to systematically analyze each type of pleading related to a patent-infringement suit and derive context-specific requirements based on the analysis.

What is clear from the Supreme Court’s *Twombly* and *Iqbal* decisions is that the change in the common law pleading standard is based on cost-benefit analysis. “[S]omething beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.”<sup>6</sup> Before factually complex and costly litigation proceeds, the district court retains the power to “insist upon some specificity in [the] pleading.”<sup>7</sup> The Supreme Court also agreed with the 7th Circuit’s *Car Carriers* case, which found that litigation costs and the increasing number of federal cases both argue against allowing discovery when there is no reasonable likelihood of success suggested by the plaintiff’s complaint.<sup>8</sup>

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2. Literal infringement remains the mainstay in patent infringement pleadings, but there are many other claims a plaintiff can plead including: the doctrine of equivalents, joint infringement, inducement, contributory infringement, and willful infringement. There are also many defenses an accused infringer can plead such as inequitable conduct, patent misuse, anti-trust, laches, and equitable estoppel. For the purposes of this paper, only inequitable conduct will be addressed, as it is by far the most prevalent.
  3. FED. R. CIV. P. 8(a).
  4. Robert A. Matthews, Jr., *General Aspects of Notice Pleading in a Complaint*, 6 ANNOTATED PATENT DIGEST § 39:1, 2 (2010).
  5. In addition to the pleading standard under Rule 8, some courts have also called into question the role of Rule 11, which requires all factual allegations to have evidentiary support. FED. R. CIV. P. 11(b)(3). The relationship between Rule 8 and Rule 11 is discussed further in section IV.
  6. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557–58 (2007). The Court expanded its argument on discovery cost being used as a weapon: “The threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.” *Id.* at 559.
  7. *Id.* at 558.
  8. *Id.* (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985)).

The Appendix of the Federal Rules of Civil Procedure contains forms that give practitioners some guidance in pleading certain causes of action. Form 18 lists the elements required for pleading literal patent infringement.<sup>9</sup> Because Rule 84 appears to grant automatic validity to all of the forms, Form 18 may be used to plead literal patent infringement, notwithstanding questions of its continued applicability.<sup>10</sup> This ambiguity leads to especially troublesome situations if Form 18 is used to plead causes of action other than literal patent infringement.

In Section II, this article will give a brief history of pleading practice from *Conley* to *Twombly* and *Iqbal*. Section III will then discuss Form 18 for pleading patent infringement and its suggested use through Rule 84. Section IV will outline Rule 11 and the possible expanded role it could play in determining the sufficiency of patent pleadings. Section V will begin with the discussion of patent pleadings after *Iqbal* in the context of direct infringement. This will include what the plaintiff should plead to show literal infringement, the doctrine of equivalents, and joint infringement. The article will also present a formula to show what is required to plead each cause of action. Section V will then discuss both indirect patent infringement pleadings of inducement and contributory infringement. Section V will finish with discussions of the willful infringement and inequitable conduct pleading standards. Finally, in Section VI, the conclusion will review the discussion and recommendations of the standards for pleading patent infringement related causes.

## II. A BRIEF HISTORY OF PLEADING PRACTICE

Notice pleading under Rule 8 requires only short and plain statements of the court's jurisdiction, the claim, and a demand for relief.<sup>11</sup> More specifically, Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>12</sup> While the rule is succinctly written, there has been much debate as to what evidence the plaintiff must possess to show the court he is indeed "entitled to relief."<sup>13</sup> As of 2009, the Supreme Court stated that "Rule 8 does not empower [a plaintiff] to plead the bare elements, . . . affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss."<sup>14</sup>

In a 1957 class-action suit for a declaratory judgment, the Supreme Court's *Conley v. Gibson* decision declared that "a complaint should not be

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9. FED. R. CIV. P. Form 18.

10. *See id.* at (3).

11. FED. R. CIV. P. 8(a).

12. *Id.*

13. *See* *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1954 (2009); *Twombly*, 550 U.S. at 557-58.

14. *Iqbal*, 129 S.Ct. at 1954.

dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.”<sup>15</sup> The Court noted that Rule 8 only requires a “short and plain statement” and not a claim based on exhaustive facts.<sup>16</sup> This liberal pleading standard was designed to “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>17</sup> The Court also noted that the Forms included with the Rules demonstrate the low threshold to plead certain causes of action.<sup>18</sup>

In 2007, the Supreme Court articulated a new pleading standard in *Bell Atlantic v. Twombly* that abrogated *Conley*’s “no set of facts” as “an incomplete, negative gloss on an accepted pleading standard.”<sup>19</sup> The *Twombly* Court reiterated that a pleading under Rule 8(a)(2) requires only “‘a short and plain statement of the claim showing that the pleader is entitled to relief’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”<sup>20</sup> In redefining the pleading standard, though, the *Twombly* Court first added that “a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”<sup>21</sup>

The Supreme Court also required: “[f]actual allegations [to] be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact).”<sup>22</sup> The plaintiff must distinguish the defendant’s behavior as more than “consistent with [illegality] but just as much in line with a wide swath of rational and competitive business strategy.”<sup>23</sup> A complaint must include allegations, whether direct or inferential, as to all material elements of the cause of action.<sup>24</sup> *Twombly* also reiterated the district courts’ inherent freedom to allow

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15. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (emphasis added).

16. *Id.* at 47.

17. *Id.*

18. *Id.*

19. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007). The Court, later in the opinion, also said “judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard.” *Id.* at 562.

20. *Id.* at 555.

21. *Id.*

22. *Id.*

23. *Id.* at 554. This leaves the defendant’s actions in legally-neutral territory. *See id.* at 557.

24. *Id.* at 562.

a tenuous complaint “even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that recovery is very remote and unlikely.’”<sup>25</sup>

The *Twombly* Court went to great lengths to address the role of alleged facts in pleadings. In the antitrust context, the Court said a complaint “must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could . . . be independent action.”<sup>26</sup> Benjamin Spencer distilled four presumptions from the *Twombly* decision:

- (1) If allegations of objective facts present a scenario that, if true, suggests wrongdoing on the part of the defendant, that scenario possesses a presumption of impropriety and thus sufficiently states a claim;
- (2) If allegations of objective facts present a scenario that, if true, is neutral with respect to wrongdoing by the defendant, that scenario enjoys a presumption of propriety and thus fails to state a claim;
- (3) If the objective facts alleged present a scenario that enjoys a presumption of propriety, the addition of speculative suppositions to suggest wrongdoing will not overcome that presumption and the pleading will fail to state a claim; and
- (4) If the objective facts alleged present a scenario that enjoys a presumption of propriety, the addition of supported implications that suggest wrongdoing will overcome that presumption and thus the pleading will properly state a claim.<sup>27</sup>

With his assertion that “[t]he key dividing line seems to be between claims that require suppositions to connote wrongdoing and those based on facts that indicate impropriety on their own,” Spencer assumes that a pleading contains objective facts within it.<sup>28</sup>

Almost two years after deciding *Twombly*, the Supreme Court again addressed the standard for pleading under Rule 8 in *Ashcroft v. Iqbal*. In that case, the Court held that a plaintiff must plead facially plausible factual matter to suggest wrongdoing.<sup>29</sup> The Court defined facial plausibility as “factual content that allows the court to draw the reasonable inference that the defendant is liable. The plausibility standard is not . . . a probability requirement,

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25. *Id.* at 556.

26. *Id.* at 557.

27. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 15–17 (2009).

28. *Id.* at 33.

29. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1948–49 (2009) (“[T]o state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.”).

but it asks for more than sheer possibility that a defendant has acted unlawfully.”<sup>30</sup>

The Court laid out two principles to determine the sufficiency of a pleading. First, all allegations in a complaint must be accepted as true, except for legal conclusions.<sup>31</sup> Second, a complaint must state a plausible claim for relief.<sup>32</sup> The Supreme Court stated that “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw upon its judicial experience and common sense.”<sup>33</sup> However, courts will not consider conclusory statements that lack a factual basis.<sup>34</sup> If the complaint contains well-pled factual allegations, a court should accept them as true and move on to a determination of plausibility.<sup>35</sup> The Supreme Court also stated, however, that “where the well-pled facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief . . . . As such, the allegations are conclusory.”<sup>36</sup> In other words, the reviewing court should determine the plausibility of the claims in the context of more likely explanations.<sup>37</sup>

### III. FEDERAL RULE OF CIVIL PROCEDURE FORM 18

The Appendix to the Federal Rules sets out the basic criteria for pleading patent infringement in Form 18.<sup>38</sup> The form is very simple and requires five things: (1) a statement of jurisdiction, (2) ownership of the patent-in-suit by the plaintiff, (3) an allegation of infringement by the defendant’s product, (4) compliance with statutory notice requirements, and (5) a demand for relief.<sup>39</sup> Rule 84 states that “[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”<sup>40</sup> According to the Federal Rules and the forms, pleading a patent-infringement case seems formulaic and uncomplicated.

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30. *Id.* at 1949.

31. *Id.*

32. *Id.* at 1950.

33. *Id.*

34. *Id.* at 1954.

35. *Id.* at 1950.

36. *Id.* at 1950–51.

37. *Id.* at 1951.

38. FED. R. CIV. PROC. Form 18.

39. *Id.*

40. FED. R. CIV. PROC. 84.

In practice, however, the application of Form 18 is not as straightforward as it appears.<sup>41</sup> The Federal Circuit's decision in *McZeal* illustrates the problem of when and how to apply Form 18 to different patent-infringement pleadings. In *McZeal*, the *pro se* plaintiff and owner of a patent sued Nextel for direct infringement under the theory of literal infringement and the doctrine of equivalents.<sup>42</sup> His complaint followed the requirements of Form 18: it asserted ownership of the patent-in-suit, named Nextel as the defendant, cited the allegedly infringed patent, described the means of infringement, and pointed to the patent law that entitled him to relief.<sup>43</sup> The Federal Circuit panel found the pleading was sufficient to put the defendant on notice and allowed the pleading.<sup>44</sup> Because *McZeal*'s complaint contained enough detail for Nextel to answer, the circuit panel's majority required nothing more from the plaintiff in spite of the fact that *McZeal* "conceded that he didn't know what device, what mechanisms or what means Nextel uses to transmit and connect its telephone customers to the rest of the world."<sup>45</sup> The majority believed "the specifics of how Sprint Nextel's purportedly infringing device works is something to be determined through discovery."<sup>46</sup>

Judge Dyk strongly dissented from the majority's holding because he believed Form 18 did not meet the standard for pleading direct infringement under the doctrine of equivalents.<sup>47</sup> In addition, he went further and argued that "a bare allegation of literal infringement using [Form 18] is inadequate to provide sufficient notice to an accused infringer under a theory of literal

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41. For example, the standard for pleadings by a *pro se* litigant may be relaxed by the reviewing court. *McZeal v. Sprint Nextel Corp.*, 501 F.3d. 1354, 1356 (Fed. Cir. 2007), *aff'd on other grounds*, 335 Fed. App'x 966 (Fed. Cir. 2009) ("[P]leadings of *pro se* litigants should be held to a lesser standard than those drafted by lawyers when determining whether the complaint should be dismissed for failure to state a claim.").
  42. *Id.* at 1355. Judge Dyk, in his dissent, refers to parts of the record that indicate that the plaintiff had abandoned his allegation of literal infringement and only retained the doctrine of equivalents complaint. *See id.* at 1359 n.1 (Dyk, J. dissenting).
  43. *Id.* at 1357.
  44. *Id.*
  45. *Id.* at 1357–58.
  46. *Id.* at 1358.
  47. *Id.* at 1359 n.1 (Dyk, J. dissenting) ("At the hearing before the district court, *McZeal* appeared not to contend that the claim limitations were literally satisfied. Sprint notes in its brief that *McZeal* 'limited his pleading to a charge of infringement under the doctrine of equivalents,' Appellee's Br. at 18, and *McZeal* did not dispute this assertion in his reply. Even if one were to read the complaint as alleging literal infringement as well as infringement under the doctrine of equivalents, I see no basis for declining to affirm the district court's dismissal of the doctrine of equivalents claim.").



infringement.”<sup>48</sup> Judge Dyk agreed with the district court, which believed that “without some factual allegations in the complaint, it is hard to see how a claimant could satisfy the requirement of not only fair notice of the nature of the claim, but also grounds on which the claim rests.”<sup>49</sup> Because *McZeal* was decided before *Iqbal*, the application of Form 18 to direct and indirect infringement, along with the other causes of action in patent litigation, was unclear. Subsequent commentators have agreed with Judge Dyk, stating that “[u]nless the complaint identifies how particular features of a product infringe specific claims, it is hard to see how a complaint includes sufficient facts to render plausible an infringement claim under *Iqbal*.”<sup>50</sup>

The Rules require courts to allow pleadings of patent infringement based on Form 18. It is unclear, however, for which specific types of infringement pleadings the form is sufficient and for which types of pleadings it is insufficient. The *Iqbal* Court acknowledged that the determination of a complaint’s facial plausibility is a “context-specific task” and will require “judicial experience and common sense.”<sup>51</sup> Patent litigation has always been treated differently from other forms of litigation, and patent pleading subsequent to *Iqbal* seems to call for a new analysis.<sup>52</sup>

#### IV. FEDERAL RULE OF CIVIL PROCEDURE 11

Rule 11(b)(3) of the Federal Rules of Civil Procedure mandates that by presenting a pleading to the court, an attorney “certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation and discovery.”<sup>53</sup> This has been interpreted as placing a burden on an attorney to “stop, think, and investigate” before filing a document with the court.<sup>54</sup> Rule 11 attempts to reduce unwarranted expense and delay caused by judicial system abuse.<sup>55</sup> As applied to patent infringement complaints, Rule 11 requires “the attorney [to] interpret the asserted patent claims and compare the accused device with those claims before filing a claim alleging infringement.”<sup>56</sup> “[T]he key factor

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48. *Id.* at 1360 (Dyk, J. dissenting).

49. *Id.* at 1362 (Dyk, J. dissenting).

50. Kenneth O’Rourke, et al., *Ashcroft v. Iqbal: The Sleeper Supreme Court Decision for Patent Litigators?*, 21 NO. 12 INTELL. PROP. & TECH. L.J. 6, 8 (2009).

51. *Iqbal*, 129 S.Ct. at 1950 .

52. The Federal Circuit was created in an effort to harmonize the law of patents.

53. FED. R. CIV. P. 11(b)(3).

54. *See* Amendments to Rules 97 F.R.D. 165, 192 (1983).

55. *Judin v. United States*, 110 F.3d 780, 784 (Fed. Cir. 1997).

56. *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1300-01 (Fed. Cir. 2004).

in determining whether a patentee performed a reasonable pre-filing inquiry is the presence of an infringement analysis . . . [consisting of] a good faith, informed comparison of the claims of a patent against the accused subject matter.”<sup>57</sup> In order to reach the conclusion that infringement has occurred, the plaintiff’s attorney must find that the accused product falls within those interpreted claims.<sup>58</sup>

The impact of Rule 11’s requirement of a pre-filing inquiry on the standard for stating a claim under Rule 8 is unclear after *Iqbal*. Judge Seeborg of the Northern District of California, in interpreting the relationship between the two Rules, noted that compliance with Rules 8 and 11 are two different issues. “Rule 8 requires factual allegations sufficient to show entitlement to relief. Under Rule 11, an attorney . . . ordinarily is deemed to be representing . . . that the factual contentions have evidentiary support.”<sup>59</sup> While these two Rules may not have an explicit relationship, it logically follows that for a pleading to show facially plausible factual allegations, an attorney must necessarily have some evidentiary support. In other words, the pleading requirements of Rule 8 cannot be satisfied if Rule 11 is not satisfied as well.<sup>60</sup>

#### V. PATENT INFRINGEMENT PLEADINGS AFTER *IQBAL*

Applying the principles of *Twombly* and *Iqbal* to patent pleading, a facially plausible claim “showing the pleader is entitled to relief” requires more than bare allegations of infringement. While the plaintiff is not required to have evidence sufficient to survive a motion for summary judgment at the pleading stage, facial plausibility requires more than serving notice to the defendant. What was once required by some local rules as an infringement contention may now be the standard for pleading patent infringement.<sup>61</sup>

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57. *Id.* at 1302.

58. *Judin*, 110 F.3d at 784.

59. *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS 2009 WL 2972374 at \*4 (N.D. Cal. Sept. 14, 2009).

60. Spencer, *supra* note 27, at 31. Spencer alludes to as much in his article, stating “[a]nother possibility would be to hold counsel to their obligation under Rule 11 to certify that factual contentions will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”

61. *See* N.D. Cal. Local Patent Rules 3-1 (2008) Disclosure of Asserted Claims and Infringement Contentions (“(a) Each claim of each patent in suit that is allegedly infringed by each opposing party; (b) Separately for each asserted claim, each accused apparatus, product, device, process, method, act, or other instrumentality (“Accused Instrumentality”) of each opposing party of which the party is aware. This identification shall be as specific as possible. Each product, device, and apparatus must be identified by name or model number, if known. Each method or process must be identified by name, if known, or by any product, device, or apparatus which, when used, allegedly results in the practice of the claimed method or process; (c) A chart identifying specifically where each element of each asserted claim is found within each Accused In-

“While the Court wants more than a formulaic recitation of the elements of a claim, there is still a lot of gray area as to just what facts a plaintiff must plead to state a claim.”<sup>62</sup> Taking this into consideration, a format for sufficiently pleading an infringement claim can be derived based on *Twombly*’s requirement that a complaint “contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.”<sup>63</sup>

To overcome a 12(b)(6) motion to dismiss, the elements of the pleading’s claims should first be laid out in sequential order just as in an infringement contention.<sup>64</sup> This allows the judge to easily assess the validity of the claim and the plausibility of the facts supporting each element. The *Twombly* Court also held that an adequately stated claim “may be supported by showing any set of facts consistent with the allegations in the complaint.”<sup>65</sup> Therefore, the plaintiff should plead facts showing or supporting an inference of misconduct by the defendant. Additionally, the plaintiff should attempt to minimize the plausibility of alternate, neutral-territory explanations of the defendant’s conduct.<sup>66</sup> While the standard is context-specific and based on whether a presumption of propriety exists, the plaintiff should objectively consider whether common sense points to infringement as the most plausible explanation.

### 1. Direct Infringement

A direct infringer is statutorily defined as “whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United

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strumentality, including for each element that such party contends is governed by 35 U.S.C. § 112(6), the identity of the structure(s), act(s), or material(s) in the Accused Instrumentality that performs the claimed function; (d) Whether each element of each asserted claim is claimed to be literally present or present under the doctrine of equivalents in the Accused Instrumentality; (e) For any patent that claims priority to an earlier application, the priority date to which each asserted claim allegedly is entitled; and (f) If a party claiming patent infringement wishes to preserve the right to rely, for any purpose, on the assertion that its own apparatus, product, device, process, method, act, or other instrumentality practices the claimed invention, the party must identify, separately for each asserted claim, each such apparatus, product, device, process, method, act, or other instrumentality that incorporates or reflects that particular claim.”). *Accord* E.D.Tex. Appendix M Local Patent Rules 3-1 2007.

62. Douglas E. Motzenbecker, *Supreme Court Raises the Pleadings Bar Again*, 35 No. 2 LITIG. NEWS, Winter 2010 at 11.

63. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007).

64. *See* N.D. Cal. Local Patent Rules 3-1.

65. *Twombly*, 550 U.S. at 563.

66. *Id.* at 557.

States . . . during the term of the patent.”<sup>67</sup> Literal infringement, doctrine of equivalents, and joint infringement all comprise direct infringement which is “a strict liability offense, but is limited to those who practice each and every element of the claimed invention.”<sup>68</sup> As the Federal Circuit in *McZeal* stated, though, a plaintiff is not required to plead element-by-element of the patent-in-suit and “a patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend.”<sup>69</sup> District courts have continued to question the applicability of Form 18 to all of the types of direct infringement, especially after the Supreme Court’s ruling in *Iqbal*.<sup>70</sup> The following three subsections discuss the forms of direct infringement and what should be the standard for pleading each in a post-*Iqbal* context.

### *a. Literal Infringement*

A complaint for literal infringement “demands that the accused product possess each and every limitation of at least one of the patent claims in suit.”<sup>71</sup> All elements of the patent-in-suit’s claims must be found in the accused infringer’s device.<sup>72</sup> Form 18, which lists the five requirements of a patent infringement pleading, seems most applicable to literal infringement. In his *McZeal* dissent, Judge Dyk argued that not only was Form 18 inapplicable to the doctrine of equivalents, but that it should be inapplicable to literal infringement as well.<sup>73</sup> Both the *McZeal* majority and dissent finally

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67. 35 U.S.C. §271(a) (2006).

68. *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1381 (Fed. Cir. 2007). Each of these doctrines is defined and analyzed in the following subsections.

69. *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007), *aff’d on other grounds*, 335 Fed. Appx. 966 (Fed. Cir. 2009); *cf. Realtime Data, LLC v. Stanley*, 2010 WL 2403779 at \*5 (E.D.Tex. June 10, 2010) (“While Realtime accuses Defendants’ ‘data compression products and/or services,’ the Court finds this to be a vague identification and without further context it is unclear as to what ‘data compression products and/or services’ refers.”).

70. *See, e.g., Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS 2009 WL 2972374 at \*2 (N.D. Cal. Sept. 14, 2009); *Sharafabadi v. Univ. of Idaho*, No. C09-1043JLR 2009 WL 4432367 at \*3 n.5 (W.D. Wash. Nov. 27, 2009); *but see Automated Transactions, LLC v. First Niagara Fin. Group, Inc.*, No. 10-CV-00407(A)(M) at 9 (W.D.N.Y. August 31, 2010) (“[U]nless or until Rule 84 is amended, I conclude that the sufficiency of [the Plaintiff’s] direct infringement allegations is governed by Appendix Form 18, not by the requirements of *Twombly* or *Iqbal*.”).

71. Craig Allen Nard, *THE LAW OF PATENTS* 434 (2008).

72. *Larami Corp. v. Amron*, 27 U.S.P.SPQ.2d 1280, 1283 (E.D. Pa. 1993), *aff’d*, 91 F.3d 166 (Fed. Cir. 1996).

73. *McZeal*, 501 F.3d. at 1360–61 (Dyk, J. dissenting).

agreed, however, that Form 18 controlled the pleading of a literal infringement claim.<sup>74</sup>

But *McZeal* was decided before *Iqbal*. There has been a post-*Iqbal* debate over Form 18's continued viability as a pleading standard, even for literal infringement, because "[t]he allegation that a product includes all the basic elements of a patent is merely the recitation of the infringement cause of action . . . [and] should arguably be ignored at the motion to dismiss stage as being conclusory."<sup>75</sup> "It is not easy to directly reconcile Form 18 with the guidance of the Supreme Court in *Twombly* and *Iqbal*; while the form undoubtedly provides a short and plain statement, it offers little to show that the pleader is entitled to relief."<sup>76</sup> On its face, Form 18 appears to be nothing more than a legal conclusion, which is precisely what *Iqbal* said the court should not rely upon.<sup>77</sup> The accused infringer cannot receive sufficient notice when the plaintiff only provides bare allegations and legal conclusions of infringement. "[Form 18] fails to state which claims are asserted and which features of the accused device are alleged to infringe the limitations of those claims."<sup>78</sup> But "[t]he line between factual allegations and legal conclusions is not always clear."<sup>79</sup> Even the most outspoken judicial critics of Form 18 accede to the notion that Rule 84 requires a court to "accept as sufficient any pleading made in conformance with the forms."<sup>80</sup> As of today, Form 18 can still be used to plead literal patent infringement despite its apparent incongruence with *Twombly* and *Iqbal*.<sup>81</sup>

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74. *Id.* at 1360. ("I agree that under Rule 84 of the Federal Rules of Civil Procedure, we would be required to find that a bare allegation of literal infringement in accordance with Form [18] would be sufficient under Rule 8 to state a claim.").

75. O'Rourke, *supra* note 50, at 8.

76. *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS 2009 WL 2972374 at \*2 (N.D. Cal. Sept. 14, 2009).

77. *Ashcroft*, 129 S.Ct. at 1949.

78. *McZeal v. Sprint Nextel Corp.*, 501 F.3d. 1354, 1360 (Fed. Cir. 2007), *aff'd on other grounds*, 335 Fed. Appx. 966 (Fed. Cir. 2009).

79. *Sharafabadi v. Univ. of Idaho*, No. C09-1043JLR 2009 WL 4432367 at \*3 (W.D. Wash. Nov. 27, 2009).

80. *Elan*, 2009 WL 2972374 at \*2; *Traffic Info., LLC v. Yahoo! Inc.*, 2010 WL 254500 at \*2 (E.D.Tex. April 13, 2010) ("The Supreme Court's decisions in *Twombly* and *Iqbal* have not affected the adequacy of complying with Form 18. To hold otherwise would render Rule 84 and Form 18 invalid.") (internal citations omitted).

81. *Sharafabadi*, 2009 WL 4432367 at \*2 ("The Federal Circuit and a range of district courts have concluded that the sample complaint in Form 18 meets the *Twombly* standard."); *cf. WIAV Networks, LLC v. 3COM Corp.*, 2009 WL 6048922 at \*3 (E.D.Tex. Dec. 15, 2009).

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**b. Doctrine of Equivalents**

The doctrine of equivalents is a judicially created doctrine that evolved in response to the strict requirements of literal infringement.<sup>82</sup> The Supreme Court reasoned that limiting an infringer to a literal interpretation of patent claims would “place the inventor at the mercy of verbalism and would subordinate substance to form.”<sup>83</sup> Because the English language is broad and interchangeable, the Court found it necessary to expand the reach of an allegedly infringed patentee by creating the doctrine of equivalents.<sup>84</sup> This doctrine prevented an accused infringer from avoiding liability by changing only minor or insubstantial details of a claimed invention while retaining the invention’s identity.<sup>85</sup>

The doctrine of equivalents is a determination of fact applied to each individual element and not the entire invention as a whole.<sup>86</sup> “In determining equivalents, things equal to the same thing may not be equal to each other and, by the same token, things for most purposes different may sometimes be equivalents.”<sup>87</sup> The Supreme Court listed four factors that must be considered in determining equivalence:

- [1] the purpose for which an ingredient is used in a patent;
- [2] the qualities it has when combined with the other ingredients;
- [3] the function which it is intended to perform; [and]
- [4] whether persons reasonably skilled in the art would have known of the interchangeability of an ingredient not contained in the patent with one that was.<sup>88</sup>

In the seminal *Graver Tank* case, the Supreme Court said a doctrine-of-equivalents claim may “proceed against the producer of a device if it performs substantially the same function in substantially the same way to obtain the same result.”<sup>89</sup>

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82. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 608 (1950).

83. *Id.* at 607.

84. *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730–32 (2002).

85. *Graver Tank*, 339 U.S. at 608.

86. *Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 29 (1997).

87. *Graver Tank*, 339 U.S. at 609.

88. *Id.*

89. *Graver Tank*, 339 U.S. at 608 (internal quotes omitted) (quoting *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 42 (1929)). The doctrine of equivalents could restrict the claims of a patent-in-suit “where a device is so far changed in principle from a patented article that it performs the same or similar function in a substantially different way, but nevertheless falls within the literal words of the claim.” *Id.* at 608–9.

By applying *Iqbal* to patent-infringement pleadings based on the doctrine of equivalents, “judicial experience and common sense” would seem to suggest something more than Form 18 would be necessary to “give the defendant fair notice of . . . the claim . . . and the grounds upon which it rests.”<sup>90</sup> The forms predate the Supreme Court’s creation of the doctrine by over ten years, and thus their creators could not have contemplated this development in common-law doctrine.<sup>91</sup> The *Twombly* Court suggested that the Forms should not be used for causes of action other than those specifically described in the Form.<sup>92</sup> In his *McZeal* dissent, Judge Dyk argued that “Form [18] does not appear on its face to address the doctrine of equivalents.”<sup>93</sup> Specificity as to which of the patent-in-suit’s elements are infringed by the defendant’s products, as required in infringement contentions, seems mandatory to show how an “accused product is insubstantially different from the patented devices.”<sup>94</sup>

Without more than conclusory allegations of infringement under the doctrine of equivalents, the defendant is not put on notice as to how to answer the complaint. “[T]o create an issue of material fact [under the doctrine of equivalents,] a patentee must prove infringement on a limitation-by-limitation basis by submitting particularized testimony.”<sup>95</sup> The evidence used to prove infringement by the doctrine of equivalents must be more than “[g]eneralized testimony as to the overall similarity between the claims and the accused infringer’s product.”<sup>96</sup> The facial plausibility standard for a pleading is lower than the standard of sufficiency of the non-movant’s evidence needed to defeat a motion for summary judgment. But the intensely technical and factual nature of a doctrine-of-equivalents cause of action ne-

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90. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

91. *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1361 (Fed. Cir. 2007), *aff’d on other grounds*, 335 Fed. Appx. 966 (Fed. Cir. 2009) (Dyk, J., concurring in part and dissenting in part) (“The form itself, which became effective in 1938, long predates the modern day doctrine of equivalents articulated by the Supreme Court more than a decade later in *Graver Tank* . . .”).

92. *Id.* (“The Supreme Court in [*Twombly*] suggests that the forms should not be interpreted as going beyond the fact situation described in the form.”).

93. *Id.*

94. *Id.*; see N.D.Cal. Local Patent Rules 3-1 (2008).

95. *McZeal*, 501 F.3d at 1363.

96. *Tex. Instruments, Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1567 (Fed. Cir. 1996), *cert. denied*, 520 U.S. 1228 (1997) (stating that “[p]ursuant to our precedent, a patentee must still provide particularized testimony and linking arguments as to the insubstantiality of the differences between the claimed invention and the accused device or process, or with respect to the function, way, result test when such evidence is presented to support a finding of infringement under the doctrine of equivalents.”) (internal quotes omitted).

cessitates “some specificity in both *alleging and proving* a doctrine-of-equivalents claim” above general accusations.<sup>97</sup> A claim that is not facially plausible and contains only legal conclusions exposes the defendant to “potentially extensive discovery before a motion for summary judgment may be filed.”<sup>98</sup> “It is necessary to allege sufficient facts in the complaint so that when the allegations . . . , however true, could not raise a claim of entitlement to relief, this basic deficiency is exposed at the point of minimum expenditure of time and money by the parties and the court.”<sup>99</sup> Therefore, Form 18 appears ill-suited for pleading infringement under the doctrine of equivalents.

The Federal Circuit, in the context of Rule 11 sanctions, has said that “a claim chart is not a requirement of a pre-filing infringement analysis, as the owner [or] inventor . . . of a patent ought to have a clear idea of what the patent covers.”<sup>100</sup> While not required, a claim chart comparing the patentee’s claims and the defendant’s product should be enough to show the complaint is facially plausible.<sup>101</sup> A pre-filing infringement analysis, consisting of an informed comparison of the claims and the accused subject matter, should also be enough to show the plaintiff is entitled to relief.<sup>102</sup>

In determining what should be required in a patent-infringement pleading under the doctrine of equivalents, a court should begin with the two *Iqbal* principles. First, the patentee should plead objective facts, and the court must accept them as true.<sup>103</sup> Legal conclusions with bare allegations of infringement will not suffice.<sup>104</sup> Second, the complaint must state a facially plausible claim for relief under the standard of the doctrine of equivalents.<sup>105</sup> This requires something more than Form 18, but possibly less than an in-depth, element-by-element analysis of equivalence in order for the defen-

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97. *McZeal*, 501 F.3d at 1363 (Dyk, J., concurring in part and dissenting in part) (emphasis added).

98. *Id.* at 1362.

99. *Id.* (internal quotes omitted) (quoting *Conley v. Gibson*, 127 S. Ct. 1961, 1966 (1957)).

100. *Q-Pharm, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1301 (Fed. Cir. 2004).

101. *Cf.* N.D. Cal. Local Patent Rules 3-1 (2008) (requiring claim chart 14 days after the Initial Case Management Conference, but including a claim chart with the pleading has the additional benefit of getting the plaintiff’s claim construction in front of the judge very early and may work as an intimidation factor against the defendant).

102. *Q-Pharm*, 360 F.3d at 1300–01.

103. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

104. *Id.*

105. *Id.* at 1950.



dant's actions as set forth in the pleading to suffer from a "presumption of impropriety."<sup>106</sup>

Allegations supported by fact must allow the court to infer that the defendant's product "performs substantially the same function in substantially the same way to obtain the same result."<sup>107</sup> A detailed, element-by-element infringement contention comparing the patentee's claims to the allegedly infringing product, such as what is currently required in an infringement contention, would seem to give a presumption of impropriety and be sufficient to put the defendant on notice.<sup>108</sup> Something less, if "supported [by] implications" that suggests wrongdoing, may also properly state a claim, but the minimum quantum of evidence required remains in flux.<sup>109</sup>

What is required to be facially plausible is still unclear. But it seems clear that a plaintiff's complaint based on the doctrine of equivalents requires more than the allegations of Form 18 to state a "claim showing that the pleader is entitled to relief" and put the defendant on notice of which product is allegedly infringing which claim so that he may competently answer.<sup>110</sup>

### c. *Joint Infringement*

The standard for pleading joint infringement is also uncertain after *Iqbal*. The definition of direct infringement requires that all claims of a patent be performed by a single actor for infringement to be found.<sup>111</sup> In addition, the Federal Circuit has held that "where the actions of multiple parties combine to perform every step of a claimed [invention], the claim is directly infringed only if one party exercises *control or direction* over the entire process such that every step is attributable to the controlling party, i.e., the mastermind."<sup>112</sup> While this extra element may be difficult to prove, the Federal

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106. See Spencer, *supra* note 27, at 15.

107. Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605, 608 (1950) (internal quotes omitted) (quoting Sanitary Refrigerator Co. v. Winters, 280 U.S. 30 (1929)).

108. See N.D.Cal. Local Patent Rules 3-1 (2008).

109. See Spencer, *supra* note 27, at 18.

110. FED. R. CIV. P. 8(a)(2).

111. 35 U.S.C. § 271(a).

112. Muniauction, Inc. v. Thomson Corp., 532 F.3d 1318, 1329 (Fed. Cir. 2008) (emphasis added). In BMC, the Federal Circuit more clearly defined when joint infringement was applicable: "vicarious liability might seem to provide a loophole for a party to escape infringement by having a third party carry out one or more of the claimed steps on its behalf. To the contrary, the law imposes vicarious liability on a party for the acts of another in circumstances showing that *the liable party controlled the conduct of the acting party.*" BMC Resources, Inc. v. Paymentech, L.P., 498 F.3d 1373, 1379 (Fed. Cir. 2007) (emphasis added).

Circuit has not lowered the bar in proving joint infringement.<sup>113</sup> In fact, the Federal Circuit acknowledged that the control or direction standard for joint infringement “may in some circumstances allow parties to enter into arms-length agreements to avoid infringement.”<sup>114</sup> A party cannot, however, contract or outsource around infringement if it retains control over the conduct of the third party.<sup>115</sup> Therefore, to plead joint infringement, direct infringement must be shown along with the additional element of “control or direction” by one of the parties. Because Form 18 does not address the additional element necessary to prove joint infringement, the Form seems insufficient for pleading joint infringement as well.

Sufficient facts evincing control or direction by a joint infringer must be pled to overcome the presumption of propriety afforded normal business practice.<sup>116</sup> Without evidence showing this element, the court cannot discern between arms-length agreements and control or direction by a mastermind, and thus the pleading should fail.<sup>117</sup> Something more than speculative allegations or legal conclusions is required. Factually supported, facially plausible allegations that suggest wrongdoing—as opposed to mere arms-length agreement—would suffice to show the plaintiff is entitled to relief.<sup>118</sup> This additional element requires evidence to overcome the presumption of neutrality initially assumed by the court.<sup>119</sup> The court can make an inference of control or direction based on evidence showing the joint infringer is responsible for the actions of a third party or that a third party acted on behalf of the joint infringer.<sup>120</sup> It is possible that a party cannot know *ex ante* of the alleged

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113. *Desenberg v. Google, Inc.*, No. 09 Civ. 10121(GBD)(AJP), 2009 WL 2337122, at \*6 (S.D.N.Y. July 30, 2009); *accord BMC*, 498 F.3d at 1381 (“Nonetheless, [the] court will not unilaterally restructure the claim or the standards for joint infringement to remedy these ill-conceived claims.”).

114. *BMC*, 498 F.3d at 1381.

115. *See Desenberg*, 2009 WL 2337122, at \*7.

116. *See Spencer*, *supra* note 27, at 16.

117. The Federal Circuit has offered a preventative solution as well: “[t]he concerns over a party avoiding infringement by arms-length cooperation can usually be offset by proper claim drafting.” *BMC*, 498 F.3d at 1381.

118. *See Spencer*, *supra* note 27, at 18; *cf. Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009).

119. *See Twombly*, 550 U.S. at 557 (“A statement of parallel conduct . . . needs some setting suggesting an agreement necessary to make out a §1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant’s commercial efforts stays in neutral territory.”); *see also Spencer*, *supra* note 27, at 17.

120. *See Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318, 1330 (Fed. Cir. 2008), *cert. denied*, 129 S.Ct. 1585 (2009). Presumably, this could be shown by a contract or communications between the parties, or an affidavit of someone with direct knowledge of the control.

control and may have to plead literal infringement until a joint infringement theory can be supported through discovery. The court may take this into consideration in allowing limited discovery if the judge feels there is a good probability that some evidence of control will be found.

## 2. Indirect Infringement

While direct infringement involves a single actor, indirect infringement involves multiple parties working together to infringe. "Where a defendant participates in infringement but does not directly infringe a patent, the law provides remedies under principles of indirect infringement."<sup>121</sup> There are two types of indirect infringement: inducement and contributory infringement.<sup>122</sup> For an indirect infringement to occur, a predicate direct infringement, committed entirely by one of the actors, must occur as well.<sup>123</sup> It is the patentee's burden to show the direct infringement for each instance of indirect infringement.<sup>124</sup>

Even if Form 18 can arguably be applied to direct literal infringement, it is inapplicable for pleading indirect infringement. There is no official form for indirect infringement analogous to direct infringement.<sup>125</sup> Inducement and contributory infringement both comprise elements in addition to those on Form 18, and thus something more is required in the pleading.<sup>126</sup> The infringement contentions used by the district courts should again serve as a guide to adequately pleading indirect infringement.<sup>127</sup> Like joint infringement, some of the factual evidence required to prove indirect infringement

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121. *BMC*, 498 F.3d at 1380.

122. 35 U.S.C. §271(b)-(c) (2003).

123. *BMC*, 498 F.3d at 1379; *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1303 (Fed. Cir. 2006); *Mallinckrodt Inc. v. E-Z-EM Inc.*, at 670 F. Supp. 2d 349, 354 (D. Del. 2009).

124. *DSU Med.*, 471 F.3d at 1303.

125. *Sharafabadi v. Univ. of Idaho*, No. C09-1043JLR, 2009 WL 4432367 at \*3 (W.D. Wash. Nov. 27, 2009).

126. *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS, 2009 WL 2972374 at \*2 (N.D. Cal. Sept. 14, 2009); *Eolas Techs., Inc. v. Adobe Sys., Inc.*, 2010 WL 2026627 at \*3 (E.D.Tex. May 6, 2010) ("Form 18 does not expressly address indirect infringement claims, and courts are split on the pleading requirements of indirect infringement."); cf. *Realtime Data, LLC v. Stanley*, 2010 WL 2403779 at \*6 (E.D.Tex. June 10, 2010). ("While acknowledging the competing approaches, the Court here evaluates the sufficiency of the Complaint in light of recent decisions requiring that a complaint alleging indirect infringement affirmatively 'identify which claims are indirectly infringed,' 'identify which methods or systems indirectly infringe,' and 'identify a direct infringer in reference to indirect infringement claims.'" (internal citations omitted).

127. See N.D.Cal. Local Patent Rules 3-1.

may not be available to a party *ex ante*, and thus the court may be more lenient on the pleading standard in these specific contexts.<sup>128</sup> Even taking these difficulties into account, the patentee's complaint must make a showing of evidence to allow the court to infer wrongdoing by the accused infringer.

*a. Inducement*

Indirect infringement by inducement is statutorily prohibited: "Whoever actively induces infringement of a patent shall be liable as an infringer."<sup>129</sup> It is the plaintiff's burden to show that the defendant induced a direct infringement and that the accused infringer "knew or should have known his actions would induce actual infringement [which] necessarily [requires] that he or she knew of the [actual] patent."<sup>130</sup> In addition, the patentee must also show "[the accused infringer] actively and knowingly aided and abetted another's direct infringement."<sup>131</sup> But "mere knowledge of possible infringement by others does not amount to inducement; specific intent and action to induce infringement [are also required]."<sup>132</sup>

Pleading inducement should require more from the plaintiff than just submitting Form 18. Based on case law, the elements needed to prove inducement are that the accused infringer: (1) induced an underlying direct infringement; (2) knew of the patent-in-suit; (3) possessed "specific intent to

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128. A relatively relaxed pleading standard with discovery on the elements that cannot be known *ex ante* may be the court's best option in balancing the efficiency and justice factors behind the notice pleading standard.

129. 35 U.S.C. §271(b) (2003). Inducement is also defined and prohibited with regards to exports under 35 U.S.C. §271(f) (2003) ("(1) Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.").

130. *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1304 (Fed. Cir. 2006); *Sharafabadi v. Univ. of Idaho*, No. C09-1043JLR, 2009 WL 4432367 at \*4 (W.D. Wash. Nov. 27, 2009) (Once direct infringement is shown by the patentee, two additional elements are required: "[1] the alleged infringer committed an act that constitutes infringement, and [2] the alleged infringer intended to cause direct infringement."). *See also* *Eolas Techs., Inc. v. Adobe Sys., Inc.*, 2010 WL 2026627 at \*3 (E.D.Tex. May 6, 2010) ("Eolas has not alleged a direct infringer in relation to its indirect infringement claims [and] [a]ccordingly, Eolas's indirect infringement claim does not state a claim for indirect infringement that is plausible on its face.").

131. *DSU Med.*, 471 F.3d at 1305.

132. *Id.*; *accord* *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1381 (Fed. Cir. 2008).

encourage another's infringement;"<sup>133</sup> and (4) took active steps to encourage another's infringement.<sup>134</sup> Because Form 18 only covers direct infringement, there are three additional elements that must be pled and supported by facts.

First, the patentee must show that the accused inducer had knowledge of the patent. The court, in applying its "judicial experience and common sense," should require factually supported allegations that the defendant knew of the patent.<sup>135</sup> This could be shown by direct evidence of knowledge or "supported implications" that suggest knowledge, but nonetheless something more than bald accusations are required.<sup>136</sup>

Second, specific intent requires more than knowledge of a possible infringement by another. Because of this, the plaintiff's pleading must overcome the presumption of propriety enjoyed by the accused defendant.<sup>137</sup> In proving inducement at trial, circumstantial evidence may be used to prove intent.<sup>138</sup> The court, however, may be reluctant "to find liability when a defendant merely sells a commercial product suitable for some lawful use."<sup>139</sup> Therefore, at the pleading stage, the plaintiff must have factually-supported allegations that "permit the court to infer more than the mere possibility of misconduct."<sup>140</sup> The evidentiary matter required to support a pleading is less than that at summary judgment or trial, but even the complaint must be facially plausible.

The last additional element of inducement beyond what Form 18 requires is that the accused infringer took active steps to induce direct infringement by another.<sup>141</sup> To establish liability, the plaintiff must plead factual allegations that show the defendant was proactive in using its product to infringe. This may be shown by evidence of advertisement, encouragement, or instruction on how to engage on an infringing use.<sup>142</sup> Evidence showing active steps need not be available *ex ante*, but a sufficient pleading should include all publically available facts that could raise an inference that discovery would bring more evidence.

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133. *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990).

134. *See MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936 (2005).

135. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

136. Spencer, *supra* note 27, at 17.

137. *See id.*

138. *Water Techs. Corp. v. Calco, Ltd.*, 850 F.2d 660, 668 (Fed. Cir. 1988).

139. *Grokster*, 545 U.S. at 936.

140. *Iqbal*, 129 S. Ct. at 1950.

141. *Grokster*, 545 U.S. at 936-37.

142. *See DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1305 (Fed. Cir. 2006).

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**b. Contributory Infringement**

The second type of indirect infringement is contributory infringement, which is defined by 35 U.S.C. §271(c).<sup>143</sup> A showing of an underlying direct infringement is a predicate element of contributory infringement.<sup>144</sup> In addition, “[c]ontributory infringement . . . requires a mens rea (knowledge) and is limited to sales of components or materials without substantial non-infringing uses.”<sup>145</sup> There are four elements of contributory infringement:

- [1] The alleged contributory infringer . . . made or sold the component in question;
- [2] The component must have no substantial non-infringing uses;
- [3] The alleged contributory infringer had knowledge of the non-staple nature of the component; [and]
- [4] The alleged contributory infringer engaged in conduct within the United States that contributed to another’s direct infringement.<sup>146</sup>

The non-staple article requirement prevents a patentee from blocking the use of an article or component with substantial non-infringing uses to protect the public interest.<sup>147</sup> It requires the alleged infringer to know there was not a substantial non-infringing use for the component.<sup>148</sup> This requisite intent is not totally defined, however, and may not even require knowledge of the “patent [or] knowledge that the component was especially made or adapted for use in an infringing manner.”<sup>149</sup> Thus, knowledge of infringe-

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143. “Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.” 35 U.S.C. § 271(c). Contributory infringement, as applied to imports into the United States, is defined and prohibited by 35 U.S.C. § 271(f)(2) (2003).

144. *Sharafabadi v. Univ. of Idaho*, No. C09-1043JLR, 2009 WL 4432367 at \*4 (W.D. Wash. 2009); *Mallinckrodt Inc. v. E-Z-EM Inc.*, 670 F. Supp. 2d 349, 354 (D. Del 2009).

145. *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1381 (Fed. Cir. 2008).

146. *See NARD*, *supra* note 71, at 528.

147. *C.R. Bard, Inc. v. Advanced Cardiovascular Sys., Inc.*, 911 F.2d 670, 675 (Fed. Cir. 1990).

148. In other words, the no substantial non-infringing use means that the accused device cannot be used for anything substantial beyond what the claims of the patent-in-suit define.

149. *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1303 (Fed. Cir. 2006).

ment will be presumed based on the non-staple nature of the article.<sup>150</sup> Therefore, a presumption of the defendant's impropriety will be created if the component in question has no other substantial non-infringing uses.<sup>151</sup>

As with inducement, the additional elements required for contributory infringement are not addressed in Form 18, and thus Form 18 is insufficient for pleading contributory infringement. In practice, whether the defendant made or sold the component in question should almost never be in doubt. The non-staple nature of the component, however, may be harder to plead sufficiently. The patentee has the burden to show the allegedly infringing component had no other substantial non-infringing uses, and the burden to plead the non-staple nature.<sup>152</sup> This would appear to be a very context-specific task requiring the court to "infer more than the mere possibility of misconduct,"<sup>153</sup> to overcome a presumption of propriety enjoyed by the defendant.<sup>154</sup> Well-pled factual allegations showing the facial plausibility of the claim for relief should be included with the complaint.<sup>155</sup> Therefore, factual allegations showing the non-staple nature of the component must be plausible on their face in order for the patentee to enjoy non-staple article presumption. Finally, Form 18 only works to plead for contribution to an underlying direct infringement, but even this element would require a plausible showing of the defendant's contribution as well.

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150. NARD, *supra* note 71, at 530.

151. This is comparable to Spencer's scenario suggesting misconduct that would have a presumption of impropriety. See Spencer, *supra* note 27, at 15.

152. Mallinckrodt Inc. v. E-Z-EM Inc., 670 F. Supp. 2d 349, 354 (D. Del 2009).

153. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).

154. In *C.R. Bard*, the defendant was charged with contributory infringement. In the context of a summary judgment motion, the court reasoned through the possible infringing and non-infringing uses of the accused device: "It would appear that three possible fact patterns may arise in the course of using the [defendant's] catheter. The first pattern involves positioning the catheter such that all of its side openings are located only in the aorta. This is clearly contemplated by the prior art '725 patent cited by the examiner. In the second of the possible fact patterns, all of the side openings are located within the coronary artery. This situation appears to have been contemplated by the '017 patent, the method patent at issue. In the third fact pattern, some of the side openings are located in the aorta and some are located in the artery. . . . [O]n this record a reasonable jury could find that, pursuant to the procedure described in the first of the fact patterns (a non-infringing procedure), there are substantial non-infringing uses for the [defendant's] catheter." *C.R. Bard, Inc. v. Advanced Cardiovascular Sys., Inc.*, 911 F.2d 670, 675 (Fed. Cir. 1990).

155. See *Iqbal*, 129 S. Ct. at 1950 ("When there are well pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief.").

### 3. Willful Infringement

Unlike direct and indirect infringement, willfulness is used only as a factor in determining damages. Section 284 provides that “the court may increase the damages up to three times the amount found or assessed.”<sup>156</sup> The Supreme Court added, “the word willful is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent.”<sup>157</sup> Willfulness is not fraud, however, and “the pleading requirement for willful infringement does not rise to the stringent standard required by Rule 9(b).”<sup>158</sup> The minimum standard for willfulness includes reckless behavior.<sup>159</sup> At trial, the patentee must show by clear and convincing evidence that “the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent.”<sup>160</sup> Many factors contribute to willfulness, and “[d]etermination of willfulness is made on consideration of the *totality of the circumstances*.”<sup>161</sup> These factors, weighed by the trier of fact, consist of:

- (1) Whether the infringer deliberately copied the ideas or designs of another;
- (2) Whether the infringer, when he knew of the other’s patent protection, investigated the scope of the patent and formed a good faith belief that it was invalid or that it was not infringed;
- (3) The infringer’s behavior as a party to the litigation;
- (4) Defendant’s size and financial condition[;]
- (5) Closeness of the case[;]
- (6) Duration of the defendant’s misconduct[;]
- (7) Remedial action by the defendant[;]
- (8) Defendant’s motivation for harm[; and]

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156. 35 U.S.C. § 284 (2000). Section 285 adds “[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party.” 35 U.S.C. § 285 (1952).

157. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (noting apparent ambiguity in the interpretation of “willful”).

158. *Ferguson Beauregard/Logic Controls, Div. of Dover Res., Inc. v. Mega Sys., LLC*, 350 F.3d 1327, 1343 (Fed. Cir. 2003); *see also* *Realtime Data, LLC v. Stanley*, 2010 WL 2403779 at \*7 (E.D.Tex. June 10, 2010) (“[T]he Federal Circuit specifically requires that a patentee [alleging willful infringement] meet the requirements of Federal Rules 8(a) and 11(b) at the time the original complaint is filed.”) (internal citations omitted).

159. *In re Seagate*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc).

160. *Id.*

161. *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1342–43 (Fed. Cir. 2004) (emphasis added).



(9) Whether defendant attempted to conceal its misconduct.<sup>162</sup>

Thus, to plead willful infringement, the patentee should show that the defendant had knowledge of the patent-in-suit and infringed in spite of such knowledge. Because the factors the fact finder may consider are so numerous, the patentee should only have to plead enough factual allegations to plausibly raise a single genuine issue of material fact.<sup>163</sup> After *Iqbal*, a sufficiently pled complaint requires factually supported allegations showing some or all of the willfulness factors. While the plaintiff need not prove his case at the pleading stage, facially plausible implications supported by facts must be pled to allow the court to infer wrongdoing by the defendant.

#### 4. Inequitable Conduct

In patent infringement cases, parties often raise the defense of patent invalidity due to inequitable conduct by the patentee.<sup>164</sup> The Federal Circuit defined inequitable conduct as a “failure to disclose material information, or submission of false material information, with an intent to deceive, and those two elements, materiality and intent, must be proven by clear and convincing evidence.”<sup>165</sup> “Information is material if there is a ‘substantial likelihood that a reasonable examiner would have considered the information important in

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162. *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 827 (Fed. Cir. 1992).

163. A previous declaratory judgment suit against the plaintiff by the defendant could be enough to show facial plausibility of knowledge of the patent-in-suit. *Mitutoyo Corp. v. Cent. Purchasing, LLC*, 499 F.3d 1284, 1290 (Fed. Cir. 2007) (“[The plaintiff] further provided details about the declaratory judgment suit filed by [defendant] in 1995, which sought to invalidate and render unenforceable the ‘902 patent, thereby establishing that [the defendant] had knowledge of the ‘902 patent prior to 2002. This is plainly more than sufficient to meet the requirements of Rule 8(a)(2) for pleading a willful infringement claim and avoid dismissal under Rule 12(b)(6).”). The absence of an infringement opinion letter from counsel, however, may not be used as evidence of willful infringement. *Knorr-Bremse*, 383 F.3d at 1345. *See also* *Realtime Data LLC v. Stanley*, 2010 WL 2403779 at \*7 (“*Seagate* clearly requires a patentee to do more than suggest that more definite allegations are to follow once discovery is underway.”). The infringement contentions do not directly apply to the factors of willful infringement, but they can still be used as a guide: each factor should be laid out with relevant evidence that tends to support wrongdoing by the accused. *See* N.D. Cal. Local Patent Rules 3-1.

164. *See Burlington Indus. Inc. v. Dayco Corp.*, 849 F.2d 1418, 1422 (Fed. Cir. 1988) (“The habit of charging inequitable conduct in almost every patent case has become an absolute plague.”).

165. *Kingsdown Med. Consultants, Ltd. v. Hollister Inc.*, 863 F.2d 867, 872 (Fed. Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1067 (1989), *aff’d*, 968 F.2d 1227 (Fed. Cir. 1992); *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1327 (Fed. Cir. 2009). While there are multiple scenarios which constitute inequitable conduct, the most prevalent is failure to disclose a reference during prose-

deciding whether to allow the application to issue as a patent.”<sup>166</sup> The intent to deceive requires more than gross negligence.<sup>167</sup> After the accused infringer defendant has established “threshold findings of materiality and intent,”<sup>168</sup> the court applies “a balancing test in which the court weighs the materiality of the prior art and evidence of the applicant’s intent to deceive the PTO to determine whether there was inequitable conduct.”<sup>169</sup>

The Federal Circuit held that “[i]nequitable conduct, while a broader concept than fraud, must be pled with particularity under Rule 9(b).”<sup>170</sup> The purpose of the heightened pleading requirement for inequitable conduct is to “provid[e] an opposing party with adequate notice, deter a party from asserting claims as a pretext for the discovery of unknown wrongs, and protect those whose reputation would be harmed as a result of being subject to fraud charges.”<sup>171</sup> “A pleading that simply avers the substantive elements of inequitable conduct, without setting forth the particularized factual bases for the allegation, does not satisfy Rule 9(b).”<sup>172</sup> Rule 9(b) states that “[m]alice,

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cution. See Kimberly A. Moore, et al., *PATENT LITIGATION AND STRATEGY* 615 (3d. ed. 2008) (original edition year).

166. *Honeywell Int’l Inc. v. Universal Avionics Sys. Corp.*, 488 F.3d 982, 1000 (Fed. Cir. 2007) (citing *Halliburton Co. v. Schlumberger Tech. Corp.*, 928 F.2d 1435, 1440 (Fed. Cir. 1991)). The USPTO also more narrowly defined information as material “when it is not cumulative to information already of record or being made of record in the application, and (1) it establishes, by itself or in combination with other information, a prima facie case of un-patentability of a claim; or (2) it refutes, or is inconsistent with, a position the applicant takes in: (i) opposing an argument of un-patentability relied on by the [PTO], or (ii) asserting an argument of patentability.” 37 C.F.R. § 1.56(b) (2000).
167. *Kingsdown*, 863 F.2d at 876 (“[A] finding that a particular conduct amounts to ‘gross negligence’ does not of itself justify an inference of intent to deceive.”).
168. *Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1178 (Fed. Cir. 1995).
169. Steven D. Moore, *Fed. Cir. Raises Bar for Inequitable-Conduct Claims*, Oct. 12, 2009 NAT’L L.J. 18 (Col. 1); accord K. MOORE, *supra* note 165, at 598.
170. *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1326 (Fed. Cir. 2009).
171. *In re Certain Bulk Welding Wire Containers and Components Thereof And Welding Wire*, USITC Inv. No. 337-TA-686 2009 WL 4757312 at \*3 (Dec. 7, 2009).
172. *Exergen*, 575 F.3d at 1326–27. “The foregoing purposes of Rule 9(b) are equally important in an ITC hearing, and inequitable conduct should be pled with the same high standard before the Commission as the Federal Circuit requires in the district courts.” *In re Certain Bulk Welding*, 2009 WL 4757312 at \*3. The Federal Circuit has also distinguished inequitable conduct from common law fraud: “inequitable conduct is a broader, more inclusive concept than common law fraud . . . . Inequitable conduct in fact is a lesser offense than common law fraud, and includes types of conduct less serious than ‘knowing and willful’ fraud.” *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1069 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 876 (1998).

intent, knowledge, and other conditions of a person's mind may be alleged generally."<sup>173</sup> In contrast, the Federal Circuit stated that "a pleading of inequitable conduct under Rule 9(b) must include sufficient allegations of underlying facts from which a court may reasonably infer [both elements of the claim]."<sup>174</sup> "A reasonable inference is one that is plausible and that flows logically from the facts alleged, including any objective indications of candor and good faith."<sup>175</sup> The facts provided to support an allegation of inequitable conduct are not required to be "a smoking gun, but rather sufficient grounds to infer the requisite knowledge and intent."<sup>176</sup>

To particularly plead inequitable conduct, the Federal Circuit in *Exergen* held "that . . . Rule 9(b) requires identification of the specific who, what, when, where, and how of the material misrepresentation or omission."<sup>177</sup> The required information needed to sufficiently plead inequitable conduct may be publicly available such as prior art not disclosed to the PTO.<sup>178</sup> In many cases, however, the large amount of factual allegations necessary to plead inequitable conduct may preclude asserting the defense at the beginning of the case.<sup>179</sup> "Taking discovery before asserting an inequitable conduct claim may . . . be necessary given *Exergen's* requirement[s]."<sup>180</sup> In addition, inequitable conduct usually only occurs in exceptional cases and it is not appropriate to plead it in every infringement case.<sup>181</sup> It may be prudent for an accused infringer to wait to assert the defense until discovery has begun and some factual allegations supporting the specific elements are found

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173. FED. R. CIV. P. 9(b).

174. *Exergen*, 575 F.3d at 1328–29. The *Exergen* court also stated "[p]leading on 'information and belief' is permitted under Rule 9(b) when essential information lies uniquely within another party's control, but only if the pleading sets forth the specific facts upon which the belief is reasonably based." *Id.* at 1330.

175. *Id.* at 1329 n.5.

176. *Konami Digital Entm't Co., Ltd. v. Harmonix Music Sys., Inc.*, No. 6:08cv286-JDL, 2009 WL 5061812, at \*2 (E.D. Tex. Dec. 14, 2009).

177. *Exergen*, 575 F.3d at 1327.

178. See Steven D. Moore, *Fed. Cir. Raises Bar for Inequitable-Conduct Claims*, Oct. 12, 2009, NAT'L L.J. 18 at 3.

179. See generally *id.*

180. *Id.* In fact, "several courts have noted that it is appropriate not to assert an inequitable conduct claim until discovery supports it." *Id.* These cases include *Cordance Corp. v. Amazon.com Inc.*, 255 F.R.D. 366, 372 (D. Del. 2009) and *Douglas Press, Inc. v. Tabco, Inc.*, No. 00 C 7338, 2004 WL 1144054 at \*1 (N.D. Ill. May 17, 2004).

181. See Kimberly A. Moore, et al., *PATENT LITIGATION AND STRATEGY* 598 (3d. ed. 2008) (original edition year).

due to the heightened requirements of pleading inequitable conduct under Rule 9(b).<sup>182</sup>

## VI. CONCLUSION AND RECOMMENDATIONS

The standard for patent pleadings is uncertain after *Iqbal*. This article attempts to systematically define an element-by-element, factually-supported approach in order to plead patent infringement related causes of action. The *Iqbal* Court stated that “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw upon its judicial experience and common sense.”<sup>183</sup> In drafting pleadings, the litigant should therefore put on a “judicial hat” and self-critique using experience and common sense.

While the minimum requirements for patent infringement pleadings remain unclear, a useable guide can be distilled from the guidelines articulated by the Supreme Court’s *Twombly* and *Iqbal* decisions, the Federal Circuit’s decisions in *McZeal* and *Exergen*, and local patent rules’ requirement for infringement contentions. First, the elements of the cause of action should be pled with particularity based on statutes and common law articulations. Second, the plaintiff should plead facts showing or supporting an inference of misconduct by the defendant for each element to attempt to minimize the plausibility of the “defendant’s efforts to stay in neutral territory.”<sup>184</sup> What was once required by local rules for infringement contention claims may now be necessary as part of an initial pleading.<sup>185</sup> Third, while not required, it may be advisable to include a claim chart with the pleading.<sup>186</sup> A plaintiff that follows this systematic method and supports each element of a claim with factual evidence or inferences will provide the court with a facially plausible patent pleading capable of surviving a Rule 12(b)(6) motion.

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182. See Steven D. Moore, *Fed. Cir. Raises Bar for Inequitable-Conduct Claims*, Oct. 12, 2009, NAT’L L.J. 18.

183. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

184. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

185. See N.D. Cal. Local Patent Rules 3-1 (2008).

186. As discussed above in note 101, including a claim chart with the pleading has the additional benefit of getting the plaintiff’s claim construction in front of the judge very early.

